Queensland Law Society

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Office of the President

31 October 2023

Our ref: WD:P&E

Committee Secretary
State Development and Regional Industries Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary

Housing Availability and Affordability (Planning and Other Legislation Amendment) Bill 2023

Thank you for the opportunity to provide feedback on the Housing Availability and Affordability (Planning and Other Legislation Amendment) Bill 2023 (**the Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law and help protect the rights of individuals. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Planning and Environmental Law Committee, whose members have substantial expertise in this area.

QLS recognises that there is a shortage of housing supply in Queensland and that Government is investigating many options to respond to the current housing crisis.

However, as a preliminary matter, QLS is disappointed that public consultation has not occurred on many of the significant amendments proposed in this Bill prior to the Bill's introduction to Parliament. Reforms of this nature must also find an appropriate balance with the existing rights of landowners and industry, particularly if investments have been made in reliance on the existing planning framework. Early and extensive consultation with the public and industry can help to identify and deal with any unintended consequences of such proposals.

In the time available, QLS has endeavoured to identify issues of concern but foreshadows there may be other unintended consequences of the amendments.

Executive summary

- QLS is concerned that a number of the matters proposed to be dealt with in regulations are inappropriate and in this regard, the Bill fails to have sufficient regard to the institution of Parliament as required by section 4 of the *Legislative Standards Act 1992* (Qld). Given the importance of many of these matters to exercising other powers under the Bill, QLS considers these matters should be prescribed in the empowering legislation and not left to a statutory instrument.
- QLS welcomes the changes to the *Planning Act 2016* (Qld) (**the Planning Act**) to validate development approvals given in Development Control Plan areas since the repeal of the IPA and applying the development assessment process under the Planning Act to development in a DCP area. These essential changes clarify the position following the decision in *JH Northlakes Pty Ltd v Moreton Bay Regional Council* [2022] QPEC 18.
- QLS also generally supports a number of the operational amendments in the Bill and the urban encroachment amendments, following the opportunity for public consultation on these amendments earlier this year. We have highlighted some specific concerns below.
- We have also highlighted some practical concerns with the proposed changes to giving public notices. We support modernisation to remove newspaper notice requirements, given the closure of many newspapers, but are concerned about the potential lack of consistency across local governments which could arise in practice with these changes.

1. Reserve power for State to acquire land or easements for development infrastructure

Subject to our concerns with criteria yet to be prescribed by regulation, QLS is cautiously supportive of the proposed State reserve power to acquire land or create easements for development infrastructure.

As noted in the Explanatory Notes, a similar power presently exists for local governments to take or purchase land for a planning purpose. The provision would confer an equivalent power on the Planning Minister.

The power to acquire land or create easements for development purposes (including compulsorily) must be fairly balanced with protecting property rights.

Subject to our comments below, our support for this approach is premised on:

- satisfaction of the criteria in proposed section 263A in the Planning Act., including that the Minister is satisfied that "*reasonable steps have been taken to obtain the agreement of the owner of the land to actions on the land that would facilitate the provision of the infrastructure but the owner has not agreed to the actions*;" and
- the application of the processes under the *Acquisition of Land Act 1967* (Qld) (**ALA**) to acquire land and pay compensation. This ensures that affected landowners and others with interests in land affected by a proposed acquisition are afforded due process and the right to claim compensation in accordance with well-established principles.

Criteria under section 263A(2)(d) of the Planning Act are yet to be prescribed

Proposed section 263A(2) of the Planning Act specifies certain criteria for land acquisition.

However, proposed section 263A(2) of the Planning Act provides that one of those criteria are that "*the taking of the land complies with the criteria prescribed by regulation*". These criteria have not been identified.

As noted in the Office of Parliamentary Counsel's "Principles of Good Legislation: OQPC guide to FLPs – The institution of Parliament - subordinate legislation": "Section 4(5)(c) of the *Legislative Standards Act 1992* (Qld) states that subordinate legislation should contain only matters appropriate to that level of legislation. Although an Act may legally empower the making of particular subordinate legislation, there remains the issue of whether the making of particular subordinate legislation under the power is appropriate. For example, an Act's empowering provision may be broadly expressed so that not every item of subordinate legislation could be made under it is necessarily appropriate in every circumstance that arises."

Given the importance of these criteria to exercising the power to acquire land, QLS considers such criteria should be prescribed in the empowering legislation, given the potential for a compulsory process to be enlivened under the ALA.

At a minimum, QLS considers it is imperative that the proposed criteria are subject to public consultation.

2. State Facilitated Applications

QLS cautiously supports the proposed reserve power enabling the Planning Minister to designate an actual or proposed development application or change application as a State facilitated application. We note these provisions are intended to streamline the assessment process for priority urban development.

However, QLS is concerned that:

(a) Prescribing criteria for declaring State facilitated applications by regulation fails to have sufficient regard to the institution of Parliament. As noted earlier, section 4(5)(c) of the *Legislative Standards Act 1992* (Qld) states that subordinate legislation should contain only matters appropriate to that level of legislation. Given the significant consequences which flow from declaring an application a State facilitated application (including restrictions on appeal rights), the criteria should be certain and should be identified in the empowering legislation.

(b) The broad regulation making power in proposed new section 106P of the Planning Act fails to have sufficient regard to the institution of Parliament. Legislation should authorise the amendment of an Act only by another Act[1] and subordinate legislation should only amend other statutory instruments.[2] The proposed amendments would permit significant matters to be prescribed by regulation. It also would permit a regulation to modify the effect of the primary legislation by allowing a regulation to prescribe:

[1] Section 4(4)(c) of the *Legislative Standards Act 1992* (Qld)
[2] Section 4(5)(d) of the *Legislative Standards Act 1992* (Qld)

- the effect of giving notice of a proposed declaration (of a State facilitated application) under proposed new section 106C of the Planning Act on the process for assessing and deciding a relevant application and any appeal period in relation to the application (new section 106P(1)(b) of the Planning Act);
- provide that, despite section 71, an approval or deemed approval of a relevant application in relation to which a notice is given under section 106C is taken not to be in effect for a stated period (proposed new section 106P(2)(a) of the Planning Act); and
- modify the relevant time periods which have otherwise been set under the Chapter 3 of the Planning Act for assessing and deciding an application that has been declared to be a State facilitated application (proposed new section 106P(2)(b) of the Planning Act).

QLS also recommends clarification about when a declaration of a State facilitated application can be made and specifically, the Bill should clarify whether such a declaration could be made after an appeal has been decided.

While the processes in the Bill are clearly intended to maximise flexibility, it introduces significant uncertainty for applicants with applications which are subject to proposed new section 106D(2) of the Planning Act.

3. Urban Investigation Zone

The Bill amends the *Planning Regulation 2017* (Qld) (**Regulation**) to insert a new Part 18A regarding urban investigations zones in which particular development will be prohibited. The Urban Investigation Zone (**UIZ**) represents a novel approach to urban planning.

QLS does not support these changes in light of the restriction on compensation rights which flow from establishing a UIZ.

The creation of a UIZ will have the practical effect of depriving landowners of compensation when they are affected by the prohibition of development that is a material change of use of premises or reconfiguring a lot for an urban purpose.

The Bill proposes that the inclusion of land in a UIZ does not amount to an adverse planning change under the current section 30 of the Planning Act. Therefore, including the land in a UIZ does not give rise to a right to claim compensation under Part 4, Division 2 of the Planning Act, provided the land has been included in accordance with "a provision of the Minister's rules that applies specifically to the making of a planning change to include land in the " UIZ.

The Explanatory Notes suggest that this is justifiable because the Minister's Guidelines and Rules (**MGRs**) will provide for notification to and submissions from affected landowners about a proposed UIZ.

It is also suggested the UIZ process is essential to prevent inconsistent development occurring while local governments undertake land use and infrastructure planning for an area.

However, as the proposed amendments to the MGRs have not been made available for review, it is unclear as to the safeguards that will exist in the absence of provision for compensation claims.[3]

Furthermore, there appears to be an inconsistency between the information provided in the Explanatory Notes – which suggest local governments must evaluate 'all feasible alternatives' - and the drafting of section 30(6A) which refers to the evaluation of 'any alternatives'.

Zoning Review and Compensation

Section 25(3)(b) of the Planning Act establishes a requirement for the zoning of land within the UIZ to be reviewed every five years. While this periodic review process is mandated, there is no guarantee that the zoning of the land will change following the review. This raises concerns especially considering the prohibition of development activities in the absence of compensation claims for landowners.

The Explanatory Notes indicate that local governments are not able to plan for all of their growth areas and provide necessary infrastructure to these areas. We suggest that if this is the case, consideration should be given to limiting the removal of compensation rights to a specified period of time.

It is not reasonable and appropriate for this situation to continue indefinitely, as indicated in the Explanatory Notes on page 10, which refers to the prohibition of keeping land on hold until it is ready to support growth.

4. Temporary Accepted Development

QLS recognises the policy intent for the proposed Temporary Accepted Development (**TAD**) process. This appears to provide a flexible mechanism for addressing urgent and emerging land use needs.

However, given that the use rights granted are temporary and cease after the stipulated period, it is imperative that the temporary nature of these developments are clearly communicated to the public to avoid any confusion or misconceptions about their continued application.

5. Development Control Plans

QLS welcomes the changes in the Planning Act to validate development approvals given under Development Control Plans (**DCPs**) and the modernisation of their assessment processes.

These amendments deal with matters arising from the Planning and Environment Court decision of *JH Northlakes Pty Ltd v Moreton Bay Regional Council* [2022] QPEC 18 regarding the application of the repealed *Integrated Planning Act 1997* (Qld) (**IPA**) in DCP areas. The decision found the development assessment process under the repealed IPA applied in DCP areas, calling into question the validity of previous development approvals made since the repeal of that Act. This decision gave rise to significant uncertainty and these amendments are critical to respond to this.

[3] Section 30(4)(h) removes the right to make a claim for compensation if land is included in the UIZ in accordance with the provisions of the Minister's guidelines and rules (MGRs) that apply specifically to the making of a planning change to include land in the UIZ.

Preserving existing rights under DCPs

However, QLS notes regulations may introduce new requirements for applications under DCPs, potentially affecting existing land development rights. QLS cautions this could give rise to an unfair outcome.

In drafting the regulation, it is crucial to avoid adversely affecting any existing rights with the application of local planning instruments and Schedule 10 of the Planning Regulation.

As noted in the Explanatory Notes:

> "*Development Control Plans were created in 1990 to manage larger scale development and have been maintained in effect through a series of transitional provisions in successive Queensland planning legislation.*"

Rights and obligations under DCPs are long-established. As we highlighted in our earlier submission during the public consultation:

> "*These DCPs are mature planning documents supporting master planned communities. The DCPs were made in consultation with the State Government at the time, and we expect that as the DCPs were developed, they took into account relevant State interests.*
>
> *These documents are also supported by infrastructure agreements that provide a level of certainty to participants about the State requirements.*
>
> *To impose further State requirements at this point in time (being many years after these documents were made) may create uncertainty and lead to the imposition of onerous requirements.*"

6. Operational amendments

QLS also supports a number of the operational amendments in the Bill, following the opportunity for public consultation on these amendments earlier this year. In particular, we support:

- modernising requirements for publishing public notices;
- improving the functionality of applicable event declarations and temporary use licences; and
- simplifying public notice requirements for the making or amendment of the Minister's Guidelines and Rules, the designation process rules and the Development Assessment Rules.

Public notices

QLS is broadly supportive of updating and streamlining notification requirements, particularly in light of the closure of many printed newspapers.

However, we are concerned that the proposed amendments to the definition of *public notice* in Schedule 2 of the Planning Act could give rise to inconsistent approaches amongst local governments for a "public notice mentioned in chapter 2, part 3, other than section 17."

The new definition provides the notice can be published "*in a way the local government considers is likely to bring the notice to the attention of persons likely interested in or affected by the information stated in the notice.*"

QLS has previously recommended:

- a clear and consistent public notification process is critical, so that members of the community can be confident in understanding where they can find information on proposals affecting them; and
- otherwise, local governments could take different approaches for similar documents or applications requiring public notification. This could be confusing for residents who live close to local government boundaries who may find one publishes in a local paper circulating in the area and the neighbouring local government publishes on a website.

For consistency, it is suggested that local governments should be required to publish information on their websites, while preserving the power for individual local governments to determine additional methods of publication (such as publishing the notice in hard copy or online news publications servicing the particular local government area).

Burden of proof for submitter appeals

QLS broadly supports this proposal, noting it addresses the issue arising following the decision of *Catterall & Ors v Moreton Bay Regional Council & Anor* [2020] QPEC 52.

Retaining walls

QLS acknowledges the need for clarification in relation to retaining walls.

However, we are concerned that simply removing the example of "*building a retaining wall*" from the definition of *building work*[4] in the Planning Act will lead to confusion. The effect could be that some retaining walls would be considered 'building works' and some could be considered 'operational works.' This proposal needs further consideration.

7. Urban encroachment amendments

QLS generally supports improvements in processes to reduce duplication, provided existing frameworks have effectively considered the potential impacts.

It seems sensible to remove the requirement to re-register in circumstances where a premises obtains a new approved environmental authority (**EA**) or development approval (**DA**) that changes (increases) the allowable impact levels for the premises.

However, QLS considers the legislation should prescribe public consultation in circumstances where:

- there is an increase in the allowable impact levels for premises; but
- there has been no public consultation in connection with the granting of the new EA or DA.

[4] See amendment proposed to definition of ***building work*** in Schedule 2 of the Planning Act, as proposed in clause 38 of the Bill

We also raise similar concerns with the proposed new section 274A of the Planning Act (Provisions relating to new or amended authority for registered premises), which merely requires public notice to be given of the new or amended authority authorising greater emissions. The section does not require public consultation inviting submissions on the increase.

The lack of public consultation in connection with a change (increase) in the allowable impact levels appears to be inconsistent with the requirement for there to be public consultation under the proposed new sections 268A and 268C of the Planning Act. These provisions require an owner of premises to undertake public consultation of a proposed application to amend their registration to include additional land in the affected area for the premises.

There is no similar requirement for an amendment which authorises greater emissions.

The Explanatory Notes suggest that:

> "*Limiting the public's ability to participate in public consultation for an urban encroachment registration renewal may be considered a possible inconsistency with the FLPs [fundamental legislative principles] relating to the rights and liberties of individuals. Arguably this is not inconsistent with FLPs because there is no change to the development approval, environmental authority or affected area, and public consultation occurred as part of the initial registration process.*"

However, this statement in the Explanatory Notes is inconsistent with the proposed new section 274A of the Planning Act which would allow for a change to an authority, by permitting an increase in emissions.

QLS recommends public consultation be prescribed for:

- the circumstances outlined in proposed new section 274A of the Planning Act; and
- any re-registration application which involves an increase in allowable impact levels for premises but where the new DA or EA did not undergo public consultation.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

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Chloé Kopilović
President